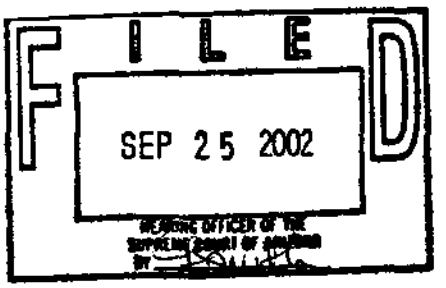

BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, JON R. POZGAY, Bar no. 003680 RESPONDENT.	Nos. 00-0016 and 01-0611 HEARING OFFICER'S REPORT AND RECOMMENDATION

PROCEDURAL HISTORY

The original Probable Cause Order was filed on October 18, 2000 relating to cause no. 00-0016 and on December 7, 2000 relating to cause no. 00-1670. A two count Complaint was filed and served by mail on December 26, 2000. Time to respond was twice extended and Answer was filed by Respondent *in propria persona* on March 1, 2001. Settlement Conference was scheduled for April 18, 2001 and May 1, 2001.

A Probable Cause Order issued on May 7, 2001 and on the same day Bar Counsel filed a Motion to Amend the Complaint to include additional allegations in Count I, to dismiss Count 2 (no. 00-1670) and to add as another Count (State Bar File Number 01-0611). The Motion was granted without objection from Respondent on May 21, 2001. A two count Amended Complaint was filed on May 29, 2001 and served by mail on May 30, 2001. Respondent, through counsel, filed Answer to Amended Complaint on June 25, 2001.

The hearing was first set on September 13, 2001 and eventually continued to March 14, 2002. On December 5, 2001 the Commission Chair granted Bar Counsel's Motion to Continue Hearing. Respondent sought a further brief extension due to his finding "it

Attachment

necessary to discharge counsel" and, without objection, the hearing was rescheduled to commence on March 28, 2002.

On March 19, 2002 Respondent filed with the Commission a Motion to Vacate Stay, Consolidate Matters and Postpone Hearing which requests were denied on March 25, 2002.

On March 20, 2002 Respondent filed with the Hearing Officer a Motion to Dismiss Count Two (00-0611) or, Alternatively, in Limine. On March 21, 2002 Respondent filed with the Hearing Officer an Alternative Motion to Dismiss All Matters Alleged In Paragraphs 11-28, 30, 37-40 and 43-48 of Amended Complaint. Telephonic oral argument was held on the pending Motions on March 26, 2002 and the Motions were denied.

Hearing was held on March 28 and April 11, 2002. On June 28, 2002 testimony was taken regarding the mitigation portion of the matter. The State Bar was represented by counsel. Respondent was *pro per*.

On April 22, 2002 the Disciplinary Commission Chair issued an order extending time for completion of the hearing for fifty days.

At Respondent's Request, a Protective Order was issued for certain pages of the transcript on July 16, 2002.

Simultaneous Post Hearing Memoranda were due to be filed on or before August 16, 2002, which date was extended to August 20, 2002 at Respondent's request. Bar Counsel's Memoranda was timely filed on August 20,2002. On August 23, 2002 Respondent filed a Motion for Protective Order Re: Filing of Memoranda which was granted that day. Because Respondent's Memorandum was not received by the Hearing Officer until after 5:00 p.m. on August 23, 2002, this Hearing Officer entered an order that the matter was taken under advisement without Respondent's Memorandum. The Memorandum was

filed with the Disciplinary Clerk's Office on August 23, 2002 and was telefaxed to the Hearing Officer shortly after 5:00 p.m. on that date. Respondent's Memorandum has been considered in reaching the Findings, Conclusions and Recommendations herein.

THE COMPLAINT

Count I alleges with regard to a particular client (Alverson) that Respondent violated ER 1.15(a),(b) and (c), ER 3.3(a)(1); ER 3.4(c), ER 8.4(c) and (d) and Rules 44 and 51(e) and (k) by filing a false fee affidavit with the court; by knowingly misappropriating funds belonging to a client, commingling client funds, failing to keep appropriate records of client funds, and failing to properly protect and maintain client funds which were in dispute; and by failing to comply with an obligation created pursuant to a judgment from a tribunal when no valid objection exists.

Count II alleges with regard to other clients and the Bar that Respondent violated ER 1.15(a) and ER 8.1(b) and Rule 43, 44 and 51(h) and (i) by failing to maintain a trust account properly, failing to maintain a trust account during certain times, commingling personal and client funds, allowing the trust accounts to become overdrawn, and by failing to provide a timely response to a request from a disciplinary authority.

FINDINGS OF FACT

1. At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on April 27, 1974.

COUNT I

2. On August 2, 1995 Respondent and Richard Alverson ["Alverson"] entered into an agreement for representation which included a written fee arrangement whereby Respondent would charge the client at the rate of $175.00 per hour with an initial retainer of

$2,500.00. [Exhibit 1] Thereafter Respondent undertook litigation on behalf of Alverson against Public Pension Fund ["Fund"] to enforce the terms of a lease agreement. [TR p.411] The litigation went through mandatory arbitration and on to a Superior Court appeal. Ultimately, Respondent was successful on behalf of Alverson [TR p.412-413] and Judgment was awarded against the Fund *inter alia* in the amount of $37, 664.50 [Exhibit 10], which included $35,000.00 in attorney's fees and $2,567.33 as a damage award for rents due directly to the Alversons [TR p.385; Exhibit 11].

3. On or about December 31, 1997 Respondent received a check from the Fund in the amount of $37, 664.58 in full settlement of the Judgment on behalf of the Alversons. He deposited $30,000.00 of that amount into his Trust Account on December 31, 1997. [TR p.385; Exhibit 39, p.4] The amount of $2,567.33, which was undisputedly due directly to the Alversons [TR p.385] was not forwarded to them in a timely manner.

4. Respondent's Trust Account balance fell below $2,567.33 following seventeen (17) different transactions between December 31, 1997 and March 26, 1998 [Exhibit 39, p.4] and on six (6) additional occasions before April 19, 1997 when Respondent claims he wrote check #1212 to the Alversons for $2,567.33. [Exhibits 14 & 39 p.4] Respondent knowingly failed to maintain sufficient funds in his Trust Account to pay Alverson the undisputed amount owed to him.

5. Although between April 10 and May 20, 1998 the Alversons repeatedly informed Respondent that they had not received his check #1212 [TR p.47, 52], Respondent failed to take appropriate action to replace the check by stopping payment on the missing check and reissuing an alternate check. [TR p.388, 491-493] Although that amount was "never in dispute" [TR 389] Respondent did not pay the Alversons the undisputed amount of

$2,567.33 until November, 1999 when the parties were already in litigation over the disputed amount.

6. A Superior Court Judge ordered Respondent to pay that amount in March, 1999 but Respondent requested a stay of that order based on "a possibility of setoffs, attorney fees and so forth". [TR p.391] He was "always convinced they actually had the check". [TR p.390]

7. At Alverson's insistence, Respondent agreed to modify the written Fee Agreement, but the modified agreement was never reduced to one written document. [TR p.417-418; Exhibits 4, 5, 6, 44, 45] Respondent agreed to accept a total of $15,000.00 through the Superior Court appeal with, at least in his mind, some sort of contingency should the matter go to Superior Court and/or should attorney's fees be awarded. [Exhibits 44, 45] Mr. Alverson believed that, at the very least, if attorneys fees were awarded, the $15,000.00 which he had paid would be returned to him. [TR p.28, 443] Respondent believed that he would limit his charges to Alverson to $15,000.00. If attorney's fees were awarded, he "would keep his 15 ... plus [all of] the amount awarded." He believed that he would keep the $35,000 recovered from the fund plus the $15,000.00 already paid by Alverson. [TR p.478-480]

8. Respondent failed to clearly elucidate to his client Alverson the nature of the modified fee arrangement and to assure that he and the client had a meeting of the minds with regard to its terms.

9. On January 21, 1998 Respondent had Alverson sign a Satisfaction of Judgment indicating that the Judgment against the Fund had been fully satisfied. [Exhibit 12]

10. From at least February 9, 1998 forward, Alverson attempted to engage Respondent

in a discussion regarding the distribution of the Judgment funds. [TR p.29; Exhibit 13, 17, 20] The attempts were not entirely clear because Alverson claimed amounts in excess of the $15,000.00 which he had initially paid. Nevertheless, by at least April 10, 1997 Respondent clearly understood that Mr. Alverson sought return of that $15,000. [Exhibit 16] Respondent failed to retain that disputed amount in his Trust Account until resolution of the dispute. [Exhibit 39]

11. Respondent's responses to Alverson's attempts to obtain some portion of the Judgment were also unclear and might best be termed obfuscating. [TR p.50-52; Exhibits 16, 18, 19, 21]

12. The attorney fee award was based on a fee affidavit which Respondent knowingly submitted to the court in the amount of $35,297.50. [Exhibit 7] Many of the billing entries in that affidavit, and in the affidavit previously submitted to the arbitrator, [Exhibit 46] are significantly higher than times previously billed to the client for the same activities on the same dates. [TR 378-380, Exhibit 3, 7] Respondent stated that he had made contemporaneous time records for the services provided to Alverson and utilized those time records when preparing the original billing statements in September, 1995 through November, 1996. [TR p. 374-376] He also stated that certain services had not been billed to the client. [TR p.377] The client billings, however, do not reflect any items or times "not charged".

The fee affidavit to the arbitrator was prepared in December, 1996. [Exhibit 46] Respondent claimed that, when he prepared the fee affidavits, he still had available to him that documentation that supported the increased hours. [TR 394] Respondent further claims that the total time reflected in the billing presented to the court was less that the

actual time spent, but he had no supporting evidence for that proposition. [TR p. 380, 593] The client had suggested that Respondent submit an inflated hourly fee rate, which he had refused to do. [TR p. 381]

The fee affidavit was false, and was submitted for the purpose of increasing the fee award over the amount actually billed to the client.

13. Respondent included a statement in the fee affidavit to the court which stated: "except for a final billing yet to be sent to plaintiff, all of my fees have been paid by plaintiff counterdefendant." [Exhibit 7, Affidavit, para. 4] Respondent claimed that he did not intend by that statement to convey the impression that the client had paid the amount claimed. [TR p.385] Respondent claims it was inadvertent, and he was merely using the same format he always used for fee requests. [TR p.420]

14. The fee application submitted to the arbitrator on December 26, 1996 is identical to that submitted to the court to the extent of time covered by both [Exhibit 7, 46]. Respondent stated that at the time the arbitration fee statement was submitted, "almost all of my fees were hourly fees because we hadn't gone beyond that yet." [TR p.420] However, the fee arrangement between Respondent and Alverson through the conclusion of arbitration was a flat fee of $10,000 which Alverson had paid by the conclusion of arbitration. [TR p.24] The affidavit submitted to the arbitrator stated:

> 3. During my representation of Plaintiff, I expended time for the performance of professional services on behalf of my client of 111.9 hours, for a total legal fees of $19,582.50. ...
> 4. Except for a final billing yet to be sent to Plaintiff, all of my fees of have been paid by Plaintiff. [Exhibit 46, Affidavit]

This statement was false.

15. In the court filed Request, Respondent quoted from the underlying Lease

Agreement, paragraph 41, that states: "In the event of any action ... under this Lease the prevailing party shall be entitled to recover the fees of its attorney ... in such amount as the court may adjudge reasonable as attorney's fees. In the event [of an action] ... to enforce any of the provisions herein contained, the non-prevailing party is required to pay all attorney's fees and costs reasonably incurred by the prevailing party." (Emphasis added) [Exhibit 7, Request, p. 5] The clear implication of this clause is that the prevailing party should not be out of pocket for attorney's fees.

At the time he submitted the fee affidavit to the court, Alverson had actually paid Respondent only $15,000. [TR p. 421] No additional amounts were "incurred" unless a judgment for attorney's fees was granted. At the time he submitted the affidavit, Respondent intended to retain all fees awarded and did not intend to return any amount to Alverson. [TR p.478-480]

16. Respondent's statements to the court were false, were knowing, and caused the arbitrator and the court to award a significantly fee higher than that billed to the client.

17. In his Closing Memorandum, Respondent argued that the statements, even if "erroneous" were not material in that attorney's fees are awarded based on the hours expended and the attorney's hourly rate." [Memorandum p. 18] This argument ignores the clear import of the Lease Agreement paragraph that "...the non-prevailing party is required to pay all attorney's fees and costs reasonably incurred by the prevailing party." [1]

The false statements were material to Judge Collins when he made the original fee

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[1] In his Closing Memorandum, at page 4-5, Respondent quoted only the first sentence of that paragraph, although both sentences were quoted to the court in support of his fee request.

award. He would have looked at the fee application differently had he been aware of the true nature of the fee agreement. [TR p.328]

18. In May, 1998 Respondent initiated a declaratory judgment action against the Alversons to have the court determine ownership of the $15,000.00 claimed by both parties. [TR p.239; Exhibit 33] The result of that lawsuit is that the Alversons were awarded judgment on February 15, 2000 in "the principal amount of $15,000.00 together with interest thereon at 10% per annum, from December 31, 1997 until paid" plus attorneys' fees in the amount of $18,152.00 plus costs of $906.90 plus interest on the attorneys' fees and costs at 10% per annum from January 11, 2000 until paid. [Exhibit 30] to total $34,058.90 plus interest. No amount has been paid on this Judgment by Respondent. [TR p.58, 595]

19. During the pendency of this litigation, the trial judge became concerned about the attorney fee affidavit which had been filed by Respondent in the Fund litigation. That issue was referred to Judge Colin Campbell for review. As a result, the Fund filed a Motion to Set Aside the Judgment for Fraud on the Court. On May 11, 2000 Judge Campbell entered an order setting aside the Judgment for attorney's fees. [Exhibit 27]

20. As a result of Judge Campbell's order, the Fund filed litigation seeking return of the $35,000.00 attorney fees which they had paid. Judgment in favor of the Fund against the Alversons in the amount of $35,000.00 plus interest was entered on October 16, 2001. Eventually that matter was settled for $25,000.00. [TR p.61]

21. In that litigation, the Alversons obtained a third party judgment against Respondent in the amount of $35,000.00 plus attorney's fees of $11,438.00 plus interest. [Exhibit 32] No amount has been paid on this Judgment by Respondent. [TR p.595]

22. Respondent now agrees that he owes the Alversons the amount they had to pay the

Fund - $25,000.00. He also acknowledges that the various judgments exist in a higher amount. [TR p.617-618] He hasn't paid because he hasn't "had it. Not any of it? Not really." [TR 618]

23. Respondent estimated that he earned a net income of approximately $75,000.00 in the year 2001 from his law practice. He expects to earn approximately the same amount in 2002. [TR p.616] He spends fifty or sixty hours a week earning that amount. [TR p.617]

24. The litigation by Respondent against the Alversons was emotionally devastating to them. [TR p.55] What followed by way of the Motion to Set Aside Judgment, the litigation by the Fund and the award against them, was "another deep hole we fell in. It's kind of like you're on a merry-go-round and you're sick and no one will let you off and you have to keep throwing more money at it and you still can't get off. [TR p.61]

COUNT II

25. In May and June, 1999 Respondent deposited funds into his trust account from a relative (Spade) in the aggregate of $65,000. [TR p.370 Exhibit 39 p. 5] Although he maintained that he either had done or expected to do some work for those relatives, Respondent ultimately determined that the funds were a loan. [TR p. 394-395] He immediately drew against the Spade deposit for personal disbursements, thus utilizing funds which he admittedly had not yet earned. [TR p. 372; Exhibit 39, p.5] By June 28, 1999 he had earned at most $5000.00 on the Spade account. [TR 397] The balance in Respondent's Trust Account on June 16, 1999 was $137.87. By October, 1999 when a final deposit was made from Spade into his Trust Account in the amount of $300,000.00, he had earned "probably $10,000." [TR 398] The balance in the Trust Account was below $500.00 on nine (9) occasions between May 20 and October 12, 1999. Respondent was both drawing

against this account for funds he had not earned, and improperly commingling amounts which were loans into the Trust Account.

26. By his own admission, Respondent commingled personal and client funds in his Trust Account; he failed to disburse from his Trust Account by prenumbered checks; he failed to exercise due care by allowing the client Trust Account to become overdrawn on several occasions and he failed to maintain a client Trust Account for the period of December 1, 1998 through April 30, 1999. [Answer para. 55; Exhibit 35, 39]

27. Respondent deposited earned fees from Semi-Systems in the amount of $9,500.00 into the Trust Account on April 29, 1998 and earned fees from Meadows into the Trust Account on December 2, 1999 [TR 468; Exhibit 39, 40]

28. Respondent made numerous personal disbursements from this Trust Accounts without maintaining records which would show that the funds were derived from earned fees. [TR p. 188, Exhibit 35, 38, 39]

29. The Trust Account was in overdraft status on numerous occasions, including : March 2, 1998, May 6, 1998, May 18, 1998, June 12 - 16, 1998, June 30, 1998. [Exhibit 35, 39] Respondent claims that the Trust Accounts went into overdraft status due to checks made payable to him which were not honored. [Answer para. 55 TR p. 454-456] He "called the bank to see if the checks had been negotiated and were good and was told by the bank that they were." [TR p.455] Respondent failed to exercise professional due care by failing to assure that the funds were available in his Trust Account before checks were written against it. These overdrafts negligent rather than a wilful intent to misappropriate client funds.

30. By letter, on March 31, 2001 Bar staff requested that Respondent supply certain

documents, including "relevant client ledgers ... for the months in which an overdrafts occurred ..." . [Exhibit 34] Respondent believed that he was required to supply client ledgers for the accounts which caused the overdrafts, which he did supply. [TR p. 458] Bar staff also asked for "an explanation of the overdrafts and nonprenumbered check disbursals." Respondent failed to provide a written explanation but did supply some documents regarding the overdrafts. [TR p.460] There were client ledgers involved in the overdrafts which he did not supply (Semi-Systems, J & W settlement, SSI) [TR p.462]

31. It is impossible to determine from the ledgers, daily balance sheets and other accounting records provided by and for Respondent's Trust Accounts the source of all incoming funds, the destination of all outgoing funds and whether those funds were earned or unearned at the time of disbursal. [Exhibits 28, 34, 35, 36, 37, 38, 39 and 40] Respondent failed to act appropriately to maintain accurate records of these accounts and was therefore unable to provide Bar staff with sufficient records to answer the questions asked of him.

32. Respondent may have been confused about the specificity of the records requested of him by Bar staff. Respondent was negligent is providing records and information in a timely manner, but this Hearing Officer cannot conclude that Respondent knowingly failed to respond to a lawful demand for information from the disciplinary authority.

MITIGATION/AGGRAVATION

33. Respondent acted in positions of civic and professional responsibility during the time in question (1996 through 2000). From 1993 to 2000 Respondent was a municipal judge on a pro bono basis. [TR p.408, 548-549] He was appointed by the Governor to the Board of Directors of the Arizona Health Facilities Authority for 7 years. [TR 408-9, 549-551] He was involved in the Crisis Nursery, a trustee of Phoenix Country Day School, coached Little

League. [TR 409] During the early and mid-1990's he assisted on a pro bono basis with undocumented aliens rights and certain probate matters. [TR 409, 553-558] He chaired the Frank Lloyd Wright Foundation event in 1998 and/or 1999. [TR p.552-553]

34. Respondent suffered personal and emotional problems during the time in question. He was personally and professionally distressed by litigation in which he was involved which lowered the esteem of the justice system in his eyes. `[TR p.517-520, 533, 540]

35. From 1998 forward, Respondent suffered personal and professional distress due to a situation which involved his wife and which resulted in prolonged litigation. [TR 521-525, 540-548]

36. Respondent and his family suffered from personal distress due to a separation between him and his wife. [TR p.529]

37. Respondent continues to suffer from personal distress due to his wife's continuing personal distress. [TR p.530]

38. Since 1994, Respondent has had financial difficulties, including a tax liability in excess of $80,000.00 to the Internal Revenue Service. [TR p.537-539]

39. Respondent suffers from depression. The symptoms first became apparent to him in early 1997. [TR p.520, 560] From 1998 forward he has undergone medical and psychiatric treatment. [TR p.560-565]

40. Marlies Korsten, M.D., Respondent's treating psychiatrist first diagnosed him as suffering from Major Depression in November, 1999. [TR p.570] She concurred with his treating physician that he had been suffering from Major Depression since 1997. [TR p.574] She did not perform objective tests but based her diagnosis on her clinical experience and direct contact with Respondent and his prior physician. [TR p.570] His depression is

chronic and "almost therapeutic resistant" although at times medications have been effective to alleviate the symptoms. [TR p.576, 587]

41. Dr. Korsten could not determine whether the Major Depression caused Respondent to file a false affidavit without reviewing the time and content of the affidavit, [TR p.581, 584] but she believed that the mental illness could have caused him to take money which was not his. [TR p.581-583] She concluded that at times his behaviors were controlled by the acute depression. [TR p.584-585].

42. Michael Brad Bayless, Ph.D., a forensic clinical psychologist, evaluated Respondent at the request of the Bar. Dr. Bayless diagnosed Dysthymic Disorder, R/O Impulse Disorder NOS and R/O Paranoid Personality Disorder. [TR p.651-652; Exhibit 62] Dr. Bayless found no causal relationship between the depression and the behaviors outlined in the Bar complaint. [TR 653] He based his conclusion on the level of functioning which Respondent displayed in other areas of his life during the time of the incidents in the complaint.[TR p.654] Although Respondent does suffer from chronic depression, Bayless concluded that the behaviors complained of are characterological, rather than caused by the depression. [Exhibit 62 p.4-5, 8]

43. Respondent does suffer from chronic depression which ranges from mild to moderate to severe, and which is a mental disability. At any given time his depression would certainly have an effect on his ability to manage his financial affairs and make appropriate personal and professional judgments. If anything, the depression is more likely to effect his ability to appropriately manage his trust account (the Count II misconduct). The depression does not "control" his behaviors - good or bad - such that he either doesn't know right from wrong or is unable to apply that knowledge to his actions. The mental

disability did not cause the misconduct herein.

44. Respondent has not paid one cent toward the Judgments entered against him on behalf of the Alversons. Nevertheless he has earned approximately $75,000.00 net from his law practice in the past year and expects to do so this year. [TR p.616] He maintains a membership in the Paradise Valley County Club, pays membership dues of $225.00 monthly, and utilizes the membership for his own pleasure such as trying to play golf every Saturday. [TR p. 603, 607] He maintains a home mortgage in the amount of $2200.00 per month. [TR p.609]

45. Respondent lacks an understanding of the wrongfulness of his conduct or its effect on the Alversons. The only things he believes that he did wrong was to sue the Alversons over fees; he should have talked to them more; he should have paid them the $15,000.00 when their attorney became involved. [TR p.619-620] He "got lax" about his record keeping in the Trust Accounts. [TR p.621] He should have paid the undisputed $2,567.33 right away. [TR p. 624] Nevertheless he feels he was justified in asking for the stay because they "had claims going both ways." [TR p.623] He should have read the affidavit more carefully, but did nothing wrong with regard to the hours billed. [TR p. 626] He still believes that the Alversons were partially responsible for the attorney's fees award being set aside. [TR p. 489]

46. The incidents complained of in Count I of Complaint occurred primarily between 1997 and 1998 but were not discovered until December, 1999. Thereafter, the negative results multiplied as more and more litigation was undertaken, more and more attorney's fees were incurred, and more and more time passed without Respondent making payments on monies owed to Alverson. The Probable Cause Order on Count I was issued in October,

2000. From that point forward, any and all delays were either caused by or acquiesced in by Respondent. There is no evidence that Respondent was prejudiced by any delays.

CONCLUSIONS OF LAW

This Hearing Officer finds by clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct., specifically: ER 1.15(a), (b) and (c) (Safekeeping Property), ER 3.3(a)(1) (Candor Toward the Tribunal), ER 3.4(c) (Fairness to Opposing Party and Counsel), ER 8.4(c) and (d) (Misconduct), Rule 43 (Trust Account Verification), Rule 44 (Trust Accounts; (Candor Thereon) and Rule 51(e) and (k) (Grounds for Discipline) as follows:

COUNT I

1. Respondent violated ER 3.3(a)(1) by knowingly submitting a false and inflated fee affidavit to the arbitrator and to the court in an effort to increase the fee award over the amount actually billed to the client with the intention of keeping that amount for himself.

2. Respondent violated ER 3.3(a)(1) by knowingly submitting a false statement to the arbitrator and to court alleging that he had been paid by the client the amount he was seeking as a fee award knowing that he had not and intending to keep all amounts paid under the fee award for himself, despite the lease clause which stated that a fee award was in tended to include only attorneys fees "reasonably incurred by the prevailing party".

3. These false statements were material and involved dishonesty, fraud, deceit or misrepresentation which violates ER 8.4(c).

4. These false statements were prejudicial to the administration of justice in violation of ER 8.4(d) in that they required the court to set aside its prior judgment for fraud on the court, and required the Plan and the Alversons to initiate additional litigation to recover their losses.

5. Respondent violated ER 1.15(a) and Rule 44 by repeatedly, and without any consideration of the amount owing the Alversons, allowing his Trust Account to drop below an amount with he could have promptly paid the Alversons the undisputed amount of $2,567.33 which constitutes a conversion of those funds to his own use.

6. Respondent violated ER 1.15(b) by not promptly paying the Alversons the undisputed amount of $2,567.33.

7. Respondent violated ER 1.15(c) by knowingly failing to maintain an amount in his Trust Account sufficient to cover the disputed amount of $15,000.00.

8. By failing to pay the Alversons the undisputed amount of $2,567.33 when ordered by Judge Sheldon, and by failing to pay any amount on the other judgments obtained against him by the Alversons, Respondent violated ER 3.4(c) and Rule 51 (e) and (k) in that he knowingly and wilfully failed to comply with obligations created pursuant to a judgment from a tribunal when no valid objection to doing so exists.

COUNT II

9. Respondent violated ER 1.15(a), Rules 43 and 44 and Rule 51(h) in that he commingled personal funds in his Trust Accounts, made numerous personal disbursements without maintaining records which could identify that the funds being disbursed were from earned client fees and failed to maintain records required by Supreme Court Rules. This Hearing Officer cannot find by clear and convincing evidence that Respondent knowingly converted client funds to his own use as alleged in Count II.

10. Respondent failed to respond to requests for information and documentation related to this investigation, but this Hearing Officer cannot find by clear and convincing evidence that the failure was knowing and intentional and therefore does not find that Respondent

violated ER 8.1(b) and Rules 51 (i) as alleged in Count II. The failure was negligent and was in part due to a misunderstanding of the request and in part due to his prior failure to maintain complete and accurate Trust Account records. As such, Respondent was in violation of Rule 51(h).

ABA STANDARDS

In determining the appropriate sanction, this Hearing Officer is mindful that the purpose of attorney discipline is not to punish the lawyer but to protect the public and the administration of justice, and to deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993); *In re Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986). The American Bar Association *Standards for Imposing Lawyer Sanctions* should be considered in determining the proper sanction. *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994); *In re Cardenas*, 164 Ariz. 149, 791 P.2d 95 (1990).

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state and (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

The Theoretical Framework for the Standards advises that multiple charges of misconduct should receive one sanction that is consistent with the sanction appropriate for the most serious instance of misconduct. Rather than imposing individual sanctions, the Framework states "multiple instances of misconduct should be considered as aggravating factors." *ABA Standards*, p.6. *Matter of Cassalia*, 843 P.2d 654 (Ariz. 1992).

This Hearing Officer considered Standard 4.0, (Violations of Duties Owed to Clients) and found as to Count I that Respondent violated his duty to preserve the client's property by failing to pay the undisputed amount in a timely manner, and by failing to

preserve that amount in his Trust Account, and by failing to preserve the disputed amount in his Trust Account. His behavior was knowing and resulted in actual injury to the client in that the funds were not available to be paid to the client when so ordered by the court. In determining the appropriate sanction, *Standard* 4.11 provides that: Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. *Standard* 4.12 provides that: Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

As to Count II, this Hearing Officer found that Respondent violated his duty to clients by negligently failing to preserve clients property, by failing to maintain accurate Trust Account records, by commingling personal and client funds, by failing to disburse by prenumbered checks, by drawing against funds he had not earned, by allowing the Account balance to fall below appropriate amounts and even into overdraft and by failing to maintain a Trust Account for a period of time. In determining the appropriate sanction, in addition to the above, *Standard* 4.13 provides: Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

This Hearing Officer considered *Standard* 6.0 (Violations of Duties Owed to the Legal System) and found that as to Count I Respondent made false statements to the court for selfish motives, which statements were prejudicial to the administration of justice and which statements ultimately resulted in serious financial injury to the client. In addition, Respondent violated his duties owed to the legal system by failing to abide by the court ordered judgments in favor of this clients.

In determining the appropriate action, *Standard* 6.11 provides: Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes serious or potentially serious adverse effect on the legal proceeding. *Standard* 6.12 states: Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding , or causes an adverse or potentially adverse effect on the legal proceeding.

Standard 6.22 states: Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

This Hearing Officer considered *Standard* 7.0 (Violations of Other Duties Owed as a Professional) and determined that Respondent failed to timely and adequately respond to requests for information from the State Bar. Standard 7.3 states: Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system.

In considering Respondent's mental state, this Hearing Officer concludes that Respondent was under enormous financial and emotional stress at the time of the incidents complained of. He had developed a personal and professional life style which he was unwilling to lose. He was facing a large IRS liability, attempting to practice on his own having previously been a member of a firm, was involved in litigation which called his

professional opinions into question, was involved in personal litigation which involved his family and was involved in serious marital difficulty. He was suffering from clinical depression.

Nevertheless, he knowingly submitted false statements to the arbitrator and the court for the purpose of increasing his own financial gain. He knowingly failed to disburse funds to his client to which the client was entitled. He repeatedly took and continues to take every available action to delay or avoid payment of court ordered obligations. He repeatedly violated the Rules and failed to appropriately manage his Trust Account for at least two years without making any effort to identify or rectify the failures. Although his emotional distress and depression undoubtedly contributed both to his failure to take the measures necessary to properly manage the Trust Account and to his making exceedingly poor judgments about how to proceed in the face of distressing situations, that depression is not the cause of Respondents' misconduct.

In considering the actual or potential injury caused by the lawyers misconduct, this Hearing Officer finds that the financial injury to the Alversons exceeds $85,000.00. The emotional harm to them was also enormous. The potential harm to his other clients by his failure to appropriately manage his Trust Account is also great in that at any time he could have been unable to bring in enough new money to pay his existing debts.

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. Factors present in aggravation are : 9.22 (b) dishonest or selfish motive (in Count I); (c) a pattern of misconduct (in Count II); (d) multiple offenses (in Count II); (g) refusal to acknowledge wrongful nature of conduct (in Count I);, (i) substantial experience in the practice of law, and (j) indifference to making

restitution (in Count I). Factors present in mitigation are: 9.32(a) absence of a prior disciplinary record, (c) personal or emotional problems,[2] and (g) character or reputation.

Case law provides that the aggravating factor of substantial experience in the practice of law is often offset by the corresponding factor of an unblemished disciplinary record during the same time period. *Matter of Shannon*, 179. Ariz. 52, 68, 876 P.2d 548 (1994).

Thus, while substantial experience in the practice of law can be an aggravating factor, when combined with the absence of any prior discipline, it may be considered a mitigating factor. *Matter of Marce*, 177 Ariz. 25, 867 P.2d 845 (Ariz. 1993).

Respondent also argued for application of mitigating factor 9.32(i) mental disability. Although Respondent was diagnosed with depression, he did not meet the four pronged criteria necessary for application of this factor, in that the disability did not cause the misconduct, respondent has just begun his recovery and there is no evidence at this time that the recovery has arrested the misconduct and that recurrence is unlikely. Respondent's mental disability was, however, considered in mitigating factor 9.32(c) and given great weight. No other aggravating or mitigating factors are found.

PROPORTIONALITY REVIEW

The Supreme Court has held that in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

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[2] Evidence of this factor was provided in sealed testimony and exhibits.

The Bar urges consideration of *In re Fresquez*, 162 Ariz. 328, 783 P.2d 774 (1989), in which the respondent faced a four count complaint which included failing to adequately represent the client, making false statements to the client, and improperly inducing the client to sign a letter of exoneration. Two days before the hearing, the Bar amended the complaint to include, as counts 5 and 6, filing a false affidavit with the Bar in an attempt to justify his failure to promptly respond to the complaint and utilizing funds from the trust account as part of the inducement previously alleged. Justice Corcoran, writing for our Supreme Court, noted that respondent's conduct in making false statements to the Bar during the investigation for the purpose of covering up his prior misdeeds, standing alone, would justify disbarment. 783 P.2d at 781. In that case, not only had respondent displayed a dishonest and selfish motive but the Court weighed heavily the additional aggravating factors of bad faith obstruction of the disciplinary proceeding and false statements during the proceeding. No mitigating factors were found. Fresquez was disbarred for violating DR 1-102(A)(4) and ER 8.4.

In the instant case, although false statements were made to the court for selfish motives, this Hearing Officer found that Respondent's behavior vis a vis the Bar proceedings was a draw - neither sufficiently obstructive to be an aggravation nor sufficiently cooperative to be a mitigation. In addition, we have here a significant mitigating factor of severe personal and emotional problem.

In a matter in which the misconduct is remarkably similar to the one before us, *Matter of Rubenstein*, 178 Ariz. 550, 875 P.2d 783 (1994), the respondent had knowingly entered into a fee agreement and accepted fees thereunder contrary to statute. When a fee arbitration award in the amount of $1,348.25 was entered against respondent in favor of the client, respondent refused to pay the amount ordered. The sanction of a five year suspension, to be followed by

a two year probation with significant probation conditions, was entered for violating ERs 1.5(a), 8.4(c) and (d). In addition to the aggravating factor of indifference to making restitution, and failure to cooperate with the disciplinary proceedings, respondent in *Rubenstein* had two prior disciplinary offenses including a two year probation just two years prior. No mitigation factors were found. In the matter before us, Respondent had additional, repeated, trust account violations but no prior discipline and several mitigating factors.

In *Matter of Olsen*, 180 Ariz. 5, 881 P.2d 337 (1994), in a *pro hac vice* application, Respondent knowingly falsely avowed to the court that he was an active member of the bar in two other states. The Commission determined that the conduct warranted disbarment, however, Olsen was not a member of the Arizona Bar and therefore the highest sanction that could be imposed was censure. Presumably there were no mitigating factors in *Olsen*, since none were discussed.

Respondent urges consideration of several disciplinary decisions for the proposition that a short suspension is adequate to protect the public and the profession in this situation.

In *Matter of Marce, supra,* the Commission noted that substantial experience in the practice of law, while technically an aggravating factor, "could be viewed as mitigation" in light of respondent's clean discipline record. In that matter, respondent's absence of selfish or dishonest motive, lack of intention to harm his clients, lack of actual harm to the clients, full and free disclosure and delay in the disciplinary proceeding (nearly ten years) dictated censure as the most appropriate discipline. Those mitigating factors are lacking here.

In *Matter of Arrick*, 180 Ariz. 136, 882 P.2d 943 (Ariz. 1994) respondent had been on interim suspension for four years at the time the decision was entered. The hearing committee had recommended a one year suspension followed by probation. The Commission

recommended disbarment. Respondent had done a totally inadequate job of preparing his client's defense to serious criminal charges, had lied to the clients about the results of his preparation and had failed to return an unearned portion of his fee. Justice Zlaket, writing for the Court, stated:

> ... the existence of a mental impairment or illness affects the analysis of whether a person acts intentionally.... A person whose conduct results from a mental impairment or conditions might not have the 'conscious objective' to engage in such behavior.... [T]he committee found that he "suffered from alcoholism over a long period, which at various times impacted upon his ability to practice law, and *"which impaired his judgment during the period of time he represented"* her. More importantly, there is no clear and convincing proof that respondent *intentionally failed to represent his client.* ... Rather, it appears more likely that his omissions were negligent and caused in large measure by his addiction to alcohol. (Emphasis in original) (882 P.2d at 946-947)

The Court further found that: "Although respondent initially did not intend to harm his clients, we adopt the finding related to dishonest or selfish motives because of his deliberate misrepresentations to Mrs. E, which were clearly designed to cover his negligence. We also agree that the inappropriate retention of her fee indicates such a motive." 882 P.2d at 950.

Based on respondent Arrick's long term efforts and sincere commitment to maintain sobriety (he had been in recovery for nine years at the time the decision issued), and the fact that he had been on interim suspension for a full four years, the Court found the Commission's recommendation of disbarment overly harsh. The Court imposed a retroactive suspension of four years, allowed him to apply for reinstatement and, if reinstated, be put on probation for two years for violating DR 1-102(A)(4), DR 2-106(A), DR 6-101(A)(2) and (3).

This decision is distinguishable in that this Hearing Officer did not find that Respondent's mental disability caused his misconduct, and did not find that he has been on a period of suspension, voluntary or otherwise. Nor have the problems which so impaired Respondent's ability to function in the passed been fully resolved. He is in therapy for depression, but the financial and marital stress continues.

With regard to Count II, the trust account violations, in *Matter of Brooks*, 175 Ariz. 142, 854 P.2d 776 (Ariz. 1993) respondent failed to maintain a sufficient balance in his Trust Account to cover obligations to client, failed to separate his own funds from clients and failed to maintain adequate records to show what, in fact he did with trust funds. Although the client's funds were not jeopardized, they might have been. Having found numerous mitigating factors, including respondent's efforts to return the funds when requested, the Commission imposed a 30 day suspension combined with a two year probation, noting that, without "...these extenuating circumstances, this matter would be serious enough to warrant disbarment." 854 P.2d at 781. Brooks conduct violated ER 1.15(a) and SCR 44(b)(3).

In *Matter of Cord*, SB-01-0042 (2001) respondent's trust account violations were generally similar to those in Count II before us here. The lawyer was sanctioned with a three month suspension and two year probation with LOMAP and TAEEP for violating ER 1.15 and SCRs 43, 44 and 51(h). *See* also: *Matter of Silkey*, SB-01-0078-D (2001) in which a 60 day suspension and one year of probation was imposed for violating ER 1.15(a) and SCRs 43(a), 44(a), and 51(h) and (i); However, in *Matter of Oliver*, SB-01-0123-D (2001) respondent was sanctioned with disbarment for conduct

which was in large part similar to what is seen here and in violation of ERs 1.2, 1.3, 1.4, 1.5, 1.15, 1.16(d), 8.1, 8.4 and SCRs 43, 44 and 51(h) and (i).

In summary, applying the *Standards* and comparing the facts of similar cases, the most serious incidents of misconduct as violations of the duties owed to his clients are Respondent's failure to disburse the undisputed funds ($2,567.33) to the Alverson's, and his subsequent conversion of that amount to his own use, and his failure to preserve the disputed amount ($15,000.00) in his Trust Account. These incidents were knowing and caused actual injury to the client. Disbarment is the presumptive sanction for these violations.

The most serious incidents of misconduct as violations of the duties owed to the legal system are the false statements which respondent intentionally made to the court for selfish motives, which were prejudicial to the administration of justice and which ultimately resulted in serious financial injury to the client. Disbarment is the presumptive sanction for these violations. Suspension would be the presumptive sanction if Respondent merely knew that false statements were being submitted and took no remedial action.

Of almost equal seriousness in this Hearing Officer's eyes is Respondent's failure to abide by his obligation to pay the judgments against him in his clients' favor. This failure is knowing and has caused actual injury to his clients and actual or potential interference with legal proceedings. This Hearing Officer is unpersuaded that Respondent was financially unable to even begin to make restitution to the client. Suspension is the most appropriate sanction for this violation.

Respondent urges consideration of his "voluntary suspension" in mitigation. This Hearing Officer specifically rejects that argument because, by his own testimony, Respondent did not, in fact, enter a suspension. He may have limited his clientele, voluntarily or otherwise, but he was working fifty to 60 hours a week and earning approximately $75,000.00 per year during 2001 and currently.

Nor has Respondent voluntarily entered into programs designed to rehabilitate him. His therapy for depression is appropriate. However, there was no testimony that he had developed a repayment plan, was taking training regarding trust account management, anger management, financial management, or marital counseling.

Nonetheless, this Hearing Officer was persuaded by the significant mitigation present in the record, specifically Respondent's personal and emotional problems and his long period of practice without any disciplinary action, and determined the presence of these factors justify a reduction in the presumptive sanction of disbarment to a lengthy suspension followed by a lengthy and intensively supervised period of probation. This recommended sanction is within the range of reasonableness for similar misconduct and moreover, the public will be protected..

RESTITUTION

Respondent received $50,000.00 for his representation of the Alversons: $15,000.00 from the client and $35,000.00 from the Fund. The Alversons received nothing from Respondent in recompense for the fees that they paid to him, they were required to return $25,000.00 to the Fund [TR p.61, 99], and they incurred additional attorney's fees of $46,063.82 defending actions by Respondent and the Fund.

The Bar recommends restitution in the amount of $81,063.82 representing the $35,000.00 award in favor of the Alversons [Exhibits 29 and 32] and the actual amount of attorney's fees paid by them in the amount of $46,063.82. [TR p.141]. Undersigned believes that in order to truly make the client whole, the restitution amount would be $15,000.00 (originally received from the client) plus $25,000.00 (paid to the Fund) plus $46,063.82 (actual attorneys fees) for a total of $86,063.82. However, the recommendation of the Bar is adopted in order to more closely track the court judgments.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti, supra.* It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionality analysis, this Hearing Officer recommends the following:

1. Respondent shall be suspended for a period of four years effective the date of the final Judgment and Order.

2. Upon reinstatement, Respondent shall be placed on probation for two (2) years, with the following terms and conditions:

a.) Upon reinstatement and prior to accepting representation of any client, Respondent shall submit to a law office audit by the State Bar's Law Office Management Assistance Program (LOMAP) director or her designee, which audit will include a review of the hearing record, and shall comply with all recommendations of the LOMAP director or designee including, if deemed appropriate at that time, a practice monitor;

b.) Respondent shall complete the Trust Account Ethics Enhancement Program (TAEEP) offered by the State Bar prior to or within sixty (60) days of reinstatement and shall pay all required fees;

c.) Respondent shall develop a treatment plan with the qualified mental health therapist of his choice, and shall submit a treatment progress report to the Bar upon application for reinstatement.

d.) Respondent shall attend and complete the State Bar's Professionalism Course prior to or within three months of reinstatement. If Respondent has already completed the course, he shall complete it again; and

e.) In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 51(j) The Hearing Officer shall conduct a hearing at the earliest practicable date, but in no event later than thirty (30) days after receipt of said notice, to determine whether a condition of probation has been breached and, if so, to recommend an appropriate sanction. In the event there is an allegation that any of these terms have been breached, the burden of

proof shall be on the State Bar of Arizona to prove non-compliance by a preponderance of the evidence.

3. Restitution in the amount of $81,063.82 shall be paid by Respondent to the Alversons. Respondent shall develop a payment plan by which the entire amount will be repaid by the time he is eligible for reinstatement. If, for good cause, repayment is not accomplished by that time, a repayment plan shall be included in the probation conditions.

4. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 25th day of September, 2002.

C. Eileen Bond /mps

C. Eileen Bond
Hearing Officer # 7N

Original filed with the Disciplinary Clerk
this 25th day of September, 2002.

Copy of the foregoing mailed
this 25th day of September, 2002, to:

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